

22. (new) The composition of claim 16, 17, 18, 19 or 20 further comprising a sealed, airtight container.

CB *cond.* 23. (new) The composition of claim ~~23~~ ²², wherein the amount of viable bacteria remains substantially constant for at least 6 months.

PC 24. (new) The composition of claim ~~23~~ ^{22 16}, wherein the amount of viable bacteria increases during shelf storage.

REMARKS

Applicants respectfully request consideration and entry of the above amendment before examination. In the parent application, the Examiner issued a Final Office Action dated March 5, 1999 in which the Examiner rejected claims 12-15. In response, claims 12-15 have been canceled, and new claims 16-24 have been added in order to more particularly and distinctly set forth the patentable subject matter of the present invention, without introducing new matter.

The previous claims 12-15 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Lynn taken with Gelinas, and Spiller et al. and further taken with Jolly, Friend and El-Megeed et al.

Because none of the cited references, either alone or in combination, teaches or suggests the subject matter of the present claims, entry of this Amendment and favorable action on the merits of the claims are respectfully requested.

New claims 16-24 recite a composition comprising “approximately 0.1 to 10 weight percent solid, dried, viable bacteria” and claim 22 specifies that this composition further comprises a sealed, airtight container. Support in the specification for claims 16 and 22 may be found, for example, at page 12, lines 25-27.

Also, in the new claims, the Applicants have specified the concentration of the bacteria and the sealed, airtight container component in new claims 16 and 22, as described above. Moreover, the new claims 16-24 do not recite the terms “fixed” and “maintained” which was the subject at a previous rejection.

With respect to the § 103(a) rejection, the Examiner had previously asserted that claims 12-15 are unpatentable over Lynn taken with Gelinas, and Spiller et al. and further taken with Jolly, Friend and El-Megeed et al. The Applicants have canceled claims 12-15 and submitted new claims 16-24 to better define the invention over the prior art.

Lynn, Gelinas and Spiller et al. are each directed to breadmaking technology and to the extent a concentration range is disclosed, the references disclose different quantities of the yeast ingredients. As such, the amount of yeast used has to be at a minimum to maximize the quality of the bread dough. For example, the Gelinas reference cautions that “[t]he optimum quantity of yeast to be incorporated into the medium has been found to be about 0.25%. A larger content could give the eventual baked goods (prepared with the flavorant) an aftertaste.” Gelinas, col. 6, lines 29-32. Similarly, the Lynn reference recites a yeast concentration range of 0.5-1.5 wt. %, and an optimal concentration of 1.0 wt. %. Lynn, col. 12, lines 32 and 43.

In contrast, claim 16 expressly recites a nutritional or dietary composition comprising approximately 2.5 to 20 weight percent dried, non-living yeast. This range of yeast concentration has been found necessary to provide enough nutrients for the bacteria cells to maintain their vitality

during storage. As for the Spiller et al. reference, it discloses live yeast cells. Spiller et al., col. 11, line 15 (Example 1) and Example 2. The present claims, on the other hand, expressly recite non-living yeast.

As such, as a threshold issue, none of the Lynn, Gelinas or Spiller et al. references can properly be combined with references such as Jolly or Friend to form a rejection of Applicants' newly presented claims under 35 U.S.C. § 103. Each of these references is non-analogous art because the respective disclosures are not "reasonably pertinent to the particular problem with which the inventor was involved." See Stratoflex, Inc. v. Aeroquip Corp., 713 F.2d 1530, 1535, 218 U.S.P.Q. 871, 876 (Fed. Cir. 1983) quoting In re Wood, 599 F.2d 1032, 1036, 202 U.S.P.Q. 171, 174 (CCPA 1979).

Thus, any combination that includes the Lynn, Gelinas, or Spiller et al references, for example in combination with the Jolly or Friend et al references, is not a proper combination. No evidence of record exists to suggest that one of ordinary skill in the art would look to bakery formulations or process technology to overcome storage limitations for bacteria-containing nutritional supplements as in the present invention.

Finally, since the El-Megeed et al. reference is also directed to "a sourdough starter to produce bread of increased nutritive content," El-Megeed et al., Abstract, its method for optimizing the concentration of bacteria, yeast and/or protein is necessarily limited by the quality of the bread dough. Therefore, the concentration of yeast used in the method taught by the El-Megeed et al. reference must be similar to the concentration disclosed in the Lynn or Gelinas et al. references and, thus, must be much less than the yeast concentration recited in the present claims.

In view of the foregoing, it is respectfully submitted that the claims now presented in this application define patentable subject matter over the prior art cited in the Final Office Action in the parent application. Accordingly, entry of the Amendment and allowance of the application are requested.

Respectfully submitted,

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